In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-414

JOHN DEVESTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erred in refusing to give a requested lesser included offense instruction and in refusing to dismiss a count of the indictment on the ground that the indictment charged a violation of the wrong statute.

After a jury trial in the United States District Court for the District of Nevada, petitioner was convicted of three counts of issuing postal money orders without having previously received payment, in violation of 18 U.S.C. 500, and one count of embezzlement of public money, in violation of 18 U.S.C. 641. Petitioner was sentenced to concurrent terms of five years' imprisonment on each count. The court suspended execution of all but 90 days of the sentence, and petitioner was placed on probation for the remainder of the sentence. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that petitioner operated a "contract station" pursuant to an agreement with the United States Postal Service. The agreement provided that the contractor was not "an employee of the Federal Government for any purpose." Petitioner issued postal money orders without having received or paid the full amount of the monies payable; these money orders were used to pay petitioner's debts or to pay for purchases made by him. His defense at trial was that he expected, ultimately, to make full recompense.

1. 18 U.S.C. 500 makes it a crime for anyone to issue money orders without previously having received payment or paid the full amount of money payable therefor, with the purpose of fraudulently obtaining or fraudulently enabling any other person to receive from the United States any money. Petitioner's main contention is that the trial court should have instructed the jury that he could be found guilty of the "lesser included offense" of issuing, as a postal employee or officer, a money order without having received payment under 18 U.S.C. 1713. However, Section 1713 is not a lesser included offense to Section 500. Section 1713, as the court below pointed out, contains an element not a part of Section 500: the offender must be an "officer or employee" of the United States Postal Service. Here, the agreement under which petitioner operated specifically provided that petitioner was not "an employee of the Federal Government"; as an independent contractor petitioner was incapable of violating Section 1713.

2. Petitioner also was convicted of one count of embezzling and converting to his own use public monies, in violation of 18 U.S.C. 641. He contends that he should not have been charged under this statute because Congress, when it amended 18 U.S.C. 500 to include blank money orders, intended to preclude any further prosecutions under 18 U.S.C. 641 for embezzling by converting money orders.

However, in felony prosecutions under 18 U.S.C. 641 the value of the stolen or embezzled blank money orders must exceed $100. The 1972 amendment to Section 500 was designed to make the theft of blank money orders a felony without proof of value. See S. Rep. No. 92-1074, 92d Cong., 2d Sess. The result is statutes that overlap; when the stolen or embezzled money orders are worth less than $100, Section 641 provides the lesser punishment.[1] When the value exceeds $100, Section 500 provides the lesser punishment.[2] But a single act or transaction often may violate more than one criminal statute. See, *e.g.*, *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 45. In any event, since petitioner was given a concurrent sentence on this count, this Court need not attempt here to delineate to what extent, if any, the recent amendments to Section 500 preclude prosecution under Section 641. *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

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[1]Section 641 provides a maximum of one year's imprisonment and a fine of $1,000; Section 500 provides a maximum of five years' imprisonment and a fine of $5,000.

[2]Section 641 provides a maximum of ten years' imprisonment and a fine of $10,000; Section 500 provides a maximum of five years' imprisonment and a fine of $5,000.